86-662

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

NATIVE VILLAGE OF NENANA,

Petitioner,

vs

STATE OF ALASKA, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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Counsel for Petitioner

QUESTION PRESENTED

1. Whether P.L. 280 withdraws tribal civil jurisdiction or whether tribes subject to its provisions exercise concurrent jurisdiction.

PARTIES TO THE ACTION

The parties to this proceeding are the Native Village of Nenana. Petitioner: State of Alaska, Department of Health and Social Services; Respondent.

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STATE OF ALASKA, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF ALASKA

The Native Village of Nenana, a federally recognized Indian tribe, petitions for a writ of certiorari to review the judgment of the Alaska Supreme Court.

OPINIONS BELOW

The decision to decline transfer of jurisdiction of this case to the tribal court by Judge Carlson of the Alaska Superior Court, Third Judicial District, 3AN 84-144A CP (July 24, 1984) is unreported and reprinted in Appendix A. The opinion of the Alaska Supreme Court affirming that decision is reported at 722 P.2d 219 (Alaska 1986) and reprinted in Appendix B.

JURISDICTION OF THIS COURT

Jurisdiction of this Court to review the Alaska Supreme Court's decision in this matter is conferred by 28 U.S.C. §1257(3). The opinion of the state court was filed on July 18, 1986 (App. B).

STATUTES TO BE CONSTRUED

The text of the following statutes are set forth in the Appendix C:

Indian Child Welfare Act, Secs. 101 and 108, P.L. 95-608, 92 Stat. 3069 (25 USC 1911, and 1918).

P.L. 280, Sec. 3, P.L. 38-280, 67 Stat. 588, as amended by P.L. 85-615, 72 Stat. 545 (28 USCA 1360).

STATEMENT OF CASE

A.N. Jr. is a four year old child who resided in Anchorage, Alaska with his mother and stepfather. In 1984, when the child was six months old, he was severely beaten by his stepfather, and subsequently taken into protective custody by the State of Alaska.

A.N.'s natural father is an Athabascan Indian, and a member of the Native Village of Nenana, a federally recognized Indian tribe. Similarly, A.N. is also a

member of the tribe. Shortly after the child protection proceedings began, the tribe was notified, intervened and raised the federal issue in question by seeking to transfer the matter to the jurisdiction of the tribe under the Indian Child Welfare Act [25 USC 1911(b)]. (See Appendix D.) The father, mother, and stepfather did not object to the transfer. After a hearing on the matter, the Superior Court denied the tribe's petition to transfer the case, holding that the tribe did not have sufficient jurisdiction to hear the matter. The tribe appealed to the Alaska Supreme Court, which affirmed the lower Court's decision holding that P.L. 280 created exclusive State jurisdiction over matters involving the custody of Indian children and that such tribes lack such jurisdiction until the tribe's

petition for reassumption of jurisdiction under the terms of 25 USCA 1918.

REASONS FOR GRANTING WRIT

This case squarely presents the important issue of Federal Indian law, as to whether P.L. 280 [28 USCA 1360; P.L. 83-280, 67 Stat. 588 (1953); as amended by P.L. 85-615, 72 Stat. 545 (1958)] withdrew tribal court civil jurisdiction or whether tribes subject to P.L. 280 retain concurrent jurisdiction over child custody matters. Additionally, the Alaska Supreme Court has decided the federal questions raised in this case in a manner which directly conflicts with the decision of the Ninth Circuit Court of Appeals in Native Village of Stevens v Smith, 770 F.2d 1486 (9th Cir., 1985) and it's own decision In The Matter of J.M., 718 P.2d 150 (Alaska, 1986)

I

THE DECISION THAT P.L. 280 WITHDREW TRIBAL COURT CIVIL JURISDICTION OVER CHILD CUSTODY DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The Alaska Supreme Court's decision in this case held that P.L. 280 withdrew tribal court jurisdiction over child custody. While there is no language on the face of the statute which would support this contention, the Court found that subsequent legislation [i.e., the Indian Child Welfare Act, 25 USC 1918(a)] implied such a construction. This unprecedented ruling seriously challenges the jurisdiction and validity of over 200 tribal jurisdictions in Alaska, and establishes a precedence challenging the jurisdiction of various tribal courts in 15 other states.

Originally, P.L. 280 automatically extended State civil and criminal jurisdiction over reservation Indians located in five "mandatory" states (California, Minnesota, Nebraska, Oregon and Wisconsin) and authorized other states (so called "optional" states) to extend state jurisdiction over Indians within their borders. In 1958, Alaska was included within the automatic or "mandatory" terms of P.L. 280. Ten other states have taken steps to implement the optional provisions of the Act to accept some degree of jurisdiction [Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah and Washington].

Several tribes are located within the 16 states subject to P.L. 280. As noted by the Alaska Supreme Court in the case at bar, there are approximately 200 tribal entities within Alaska, many of

which are currently exercising some degree of tribal judicial authority. 722 P.2d, at _____. Of the remaining 15 states, ten have effectively assumed jurisdiction over children's proceedings. Taking into account various retrocessions of jurisdiction under P.L. 280, thirty (30) tribes were operating tribal courts exercising jurisdiction over children's proceedings in states subject to P.L. 280 in 1985. NATIVE AMERICAN TRIBAL COURT PROFILES - 1985 (Judicial Services - BIA); COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 362 n 122-127 (1984 Ed.) 370 n 195.[1]

As a general principle of federal Indian law, tribes retain the inherent

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[1] This list does not take into account tribes who have filed petitions under §1918 of I.C.W.A. The list is not complete. Additionally, the list does not take into account states subject to special jurisdictional statutes similar to P.L. 280 (i.e., New York, Maine, etc.).

authority to exercise judicial powers through their tribal courts. U.S. v Wheeler, 435 U.S. 313 (1978); National Farmers Union Insurance Co. v Crow Tribe, ___ U.S. 85 L.Ed. 2d 818 (1985). See generally COHEN, HANDBOOK OF FEDERAL INDIAN LAW 332-348 (1984 Ed.). In recent years, tribal courts have emerged as modern institutions primarily because of a line of cases which have developed federal legal principles which protect tribal court jurisdiction from unwarranted state and federal infringement. Fisher v District Court, 424 U.S. 382 (1976); Santa Clara Pueblo v Martinez, 436 U.S. 49 (1978); United States v Wheeler, supra; National Farmer's Union Insurance Co. v Crow Tribe, supra. These cases reflect a unique federal legal tradition which accords Indian tribes a measured degree of political autonomy within our federal system.

Wocester v Georgia, 31 U.S. (6 Pet.) 515 (1832). Consequently, it is most appropriate that an important question of federal law respecting Indians residing in several states should be settled by this Court, rather than by the highest Court of one of those several states.

II

THE DECISION THAT P.L. 280 WITHDREW TRIBAL COURT CIVIL JURISDICTION WAS DECIDED IN A MANNER WHICH CONFLICTS WITH BRYAN V ITASCA COUNTY AND UNITED STATES V WHEELER.

The case squarely presents an issue which has never been directly decided by this Court: i.e., whether P. 280 withdraws tribal jurisdiction and grants the State exclusive jurisdiction over civil matters, or whether the State and tribe share concurrent civil jurisdic-

tion. While the Court has never directly confronted this issue, the manner in which the Alaska Supreme Court decided the issue conflicts with the principles enunciated in Bryan v Itasca County, 426 US 363, (1976) and United States v Wheeler, 435 US 313 (1978)

As a general principle, states' authority and jurisdiction over matters concerning Indians within Indian country is limited. Williams v Lee, 358 U.S. 217 (1959); White Mountain Apache Tribe v Bracker, 448 U.S. 136 (1980). However, in 1953, Congress passed P.L. 280 which automatically extended state civil and criminal jurisdiction over reservation Indians located in five states. Additionally, the law also authorized other states to extend state jurisdiction over Indians located within their borders. In 1958, Alaska was included within the automatic or mandatory terms of P.L. 280. P.L. 85-615, 72 Stat. 545 (1958).

In 1978, Congress enacted the Indian Child Welfare Act [25 USCA 1901 et seq; P.L. No. 95-608; 92 Stat. 3069] which provides that tribes will have exclusive jurisdiction of child custody matters respecting on-reservation children, 25 USCA 1911(a); that tribes may transfer cases respecting off-reservation Indian children to the tribal court, 25 USCA 1911(b), and providing for tribes subject to state jurisdiction to reassume jurisdiction by petitioning the Secretary of the Interior. 25 USCA 1918. In declining to transfer jurisdiction of this case respecting an off-reservation child to the tribe, the Court noted that the tribe had not reassumed jurisdiction under §1918. The Court stated that:

> Our reading of 25 USC §1918(a), indicates that Congress intended that Public Law 280 give certain states, including Alaska, exclusive jurisdiction over matters

> involving the custody of Indian children, and that those states exercise such jurisdiction until a particular tribe petitions to reassume jurisdiction over such matters, and the Secretary of the Interior approves tribe's petition.
>
> Although some commentators have concluded that Public Law 280 does not create exclusive state jurisdiction, see, e.g., F. Cohen, Handbook of Federal Indian Law, 344-45 (1982 ed.); D. Case, Alaska Natives and American Laws, 490 n.119 (1978), we see no explanation for the mention of Public Law 280 in section 1981(a) unless it required reassumption. See Note, The Indian Child Welfare Act - Tribal Self-Determination Through participation in Child Custody Proceedings, 1979 Wis. L. Rev. 1202, 1212 [exclusive jurisdiction under §1911(a) is not automatic; tribes must petition for reassumption].

id, at 221

Clearly, the Court assumed that if a tribe must reassume jurisdiction, it has lost it. But the observation that the statute authorizes reassumption merely begs the ultimate question - i.e., what jurisdiction did the tribe lose by virtue of P.L. 280? The Alaska

Supreme Court's analysis ignores the analysis suggested in COHEN'S, i.e., that §1918 merely authorizes tribes to reassume any jurisdiction they may have lost as a result of P.L. 280. COHEN, supra at 372. Obviously, the extension of P.L. 280 diluted the tribe of exclusive jurisdiction over child custody proceedings. The mere extension of State jurisdiction necessarily results in the loss of the exclusive jurisdiction which would otherwise obtain under the provisions of 25 USC 1911(a). Thus, tne existence of state jurisdiction presents a tribe with an option under 25 USC 1918 to reacquire exclusive jurisdiction over child custody proceedings, regardless of whether a tribe already possesses concurrent jurisdiction. The question of whether P.L. 280 divests a tribe of civil jurisdiction must be analyzed independent of P.L. 280.

The impact of P.L. 280 on tribal jurisdiction has always been uncertain. The question of whether the extension of State jurisdiction somehow terminates or limits tribal court jurisdiction has remained unresolved. Goldberg, Public Law 280; The Limits of State Jurisdiction Over Reservation Indians, 22 UCLA L. Rev. 535, 545-53 (1975). Early interpretations of the statute held that the exercise of tribal jurisdiction would lessen the affected state's jurisdiction, and thus implied that tribal jurisdiction was limited or abrogated. See, Criminal Jurisdiction on the Seminole Reservation in Florida, 85 I.D. 433 (Op. Sol. M-36907, Nov. 14, 1978). However, upon reconsideration in light of this Court's interpretation of P.L. 280, the general view has shifted to hold that since P.L. 280 does not preclude tribal court jurisdiction, the

tribes may continue to exercise concurrent jurisdiction with the State Id.; COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 344-345 (1982 Ed.); CASE, ALASKA NATIVES AND AMERICAN LAWS, 451-453 (1984). The basis for this shift of opinion rests upon the two decisions of this Court in Bryan v Itasca County, 426 U.S. 363 (1976) and United States v Wheeler, 435 U.S. 313 (1978).

Bryan v Itasca County, 426 U.S. 363 (1976) was the first case considered by this Court dealing with P.L. 280. The case reviewed a claim for tax exemption of tribal lands within a P.L. 280 state. In holding that tribal lands continued to be immune from local and state taxation, the Court held that repeal by implication of an established tradition of immunity or self governance is to be disfavored. Id at 392. See also, Rice v Rehner, U.S. , (1983). In

reviewing the statute, this Court found no language which expressly terminated the claimed immunities and found no language terminating tribal self government. The Court stated that:

> Nothing in [P.L. 280's] legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than "private, voluntary organizations" United States v Mazurie, 419 U.S. 544, 557 95 S. Ct. 710, 718, 42 L.Ed. 2d 706 (1975) - a possible resolution if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments. id, at 388.

The clear import of this language was to confirm that tribes subject to P.L. 280 retained substantial powers of self government. This Court narrowly construed the statute saying that the Act,

> seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians... by permitting the Courts of the States to decide such disputes....- With this as the primary focus... [the statute authorizes application by the state courts of their rules of decision to decide such disputes.]

id at 383-384

The analysis utilized by the Alaska Supreme Court in Native Village of Nenana v State, substantially departs from the rationale used in Bryan v Itasca County.

There is nothing in P.L. 280 nor in I.C.W.A. which expressly abrogates tribal court civil jurisdiction. Similarly, there is nothing in either statutes legislative history which suggests that the extension of civil jurisdiction to the State should abrogate any preexisting tribal civil jurisdiction over Indian child custody proceedings.

In fact, both statutes preserve the vitality of tribal ordinances: P.L. 280 requiring State courts to give full force and effect to tribal ordinances in civil matters, 28 USCA 1360(c), and I.C.W.A. requiring State courts to give full faith and credit to tribal ordinances and court orders. 25 USCA 1911(d).

Applying the rule of Bryan that absent an express abrogation of tribal civil court jurisdiction, it continues to exist. See dicta in Three Affiliated Tribes v Wold, ___ U.S. ____ (1986).

Additionally, the Alaska Supreme Court assumed that the presence of State jurisdiction rendered concurrent tribal jurisdiction a nullity. This conflicts with this Court's analysis in United States v Wheeler, 435 U.S. 313 (1978). In that case, this Court held that the exercise of jurisdiction by a tribe is concurrent with federal jurisdiction,

and that both the tribe and the federal government may exercise jurisdiction over the same subject matter. Given that P.L. 280 is an extension of State jurisdiction based upon a delegation of federal power, it stands to reason that if the federal government delegated to the State every bit of jurisdiction it possessed, it would only delegate concurrent jurisdiction with the tribe. Logically, the delegation of jurisdiction exclusive of the tribe contemplates a delegation of authority greater than normally pertaining to the federal government, and clearly anticipates something beyond a mere delegation of existing jurisdiction. Rather, the creation of exclusive jurisdiction contemplates the delegation of all federal jurisdiction and the extinguishment of tribal jurisdiction. While P.L. 280 did not delegate all federal jurisdic-

tion, Bryan v Itasca County supra, it does not contain any extinguishment of tribal authority.

Given such a substantial departure from the interpretation of P.L. 280 employed by this Court, review of the Alaska Supreme Court's decision in this case is warranted.

III

THE ALASKA SUPREME COURT HAS DECIDED THE FEDERAL ISSUES RAISED IN THIS CASE IN A MANNER WHICH DIRECTLY CONFLICTS WITH THE DECISION OF THE NINTH CIRCUIT AND IT'S OWN COMPANION DECISION.

The case, Native Village of Nenana v State, 722 P.2d 219 (Alaska 1986), directly and dramatically conflicts with the decision in Native Village of Stevens v Smith, 770 F.2d 1486 (9th Cir. 1985) and In the Matter of J.M., 718 P.2d 150 (Alaska 1986).

In Native Village of Stevens v Smith, 770 F.2d 1486 (9th Cir. 1985), the Court heard a claim by the Native Village of Stevens against the State of Alaska to compel the payment of federal foster care payments to children subject to tribal court protective custody orders. While the Court denied the claim on other grounds, the Ninth Circuit held that tribal court orders respecting a child's custody were entitled to full faith and credit by the State. id, at 1488. Like Nenana, the Native Village of Stevens had not sought to retroceed jurisdiction under §1918 of I.C.W.A. In comparison, Native Village of Nenana holds that the tribe's jurisdiction over such matters has been implicitly withdrawn, and may only be recaptured by compliance with §1918 of I.C.W.A. Consequently, the two cases are totally inconsistent: the Ninth

Circuit upholding the validity of such orders, and the Alaska Supreme Court holding that such tribal court orders are without a jurisdictional basis.

Even more curious is the Alaska Supreme Court's holding In The Matter of J.M. 718 P.2d 150 (Alaska, 1986). J.M. was argued shortly after Native Village of Nenana v State, and was under consideration by the Courts at the same time. In J.M. the Court heard a challenge to state Court jurisdiction brought by the Native Village of Kaltag. In that case, a State Court had entered a protective custody order respecting a child who was also the subject of a tribal court protective custody order. Upon consideration of the case, the Alaska Supreme Court held that the Native Village of Kaltag had exclusive jurisdiction of the child under §1911(a) of I.C.W.A. because he was the subject of a valid prior

tribal court order. Similar to the case of Nenana and Stevens Village, however, the Native Village of Kaltag had never petitioned under §1918 of I.C.W.A. Thus, in two companion cases, the Alaska Supreme Court has entered conflicting interpretations of tribal court jurisdiction: i.e., that Nenana lacks concurrent jurisdiction in the absence of a petition for retrocession of jurisdiction, and that Kaltag exercises exclusive jurisdiction over a case without any such precondition.

Most notably, the conflict between the Ninth Circuit's decision and this most recent decision of the Alaska Supreme Court conflict in the manner in which a federal question of tribal court jurisdiction is resolved. The confusion engendered by these conflicts has raised serious questions respecting the validity of tribal court orders in child custody

proceedings, and the general scope of authority of tribal courts in Alaska and the other P.L. 280 states. As noted by the Alaska Supreme Court, there are over 200 tribes in Alaska alone, and the potential for further conflicts on this issue is likely. Consequently, the need for this Court to review and ultimately decide this issue is substantial, for all tribes and States affected by P. L. 280.

CONCLUSION

This case presents an important issue respecting the federal law governing tribal court civil jurisdiction in P.L. 280 States. This issue has remained unresolved since passage of P.L. 280 in 1953, and presently threatens to undermine the jurisdiction of several Indian tribal courts in Alaska and in several other States. This issue is most

properly decided by this Court, and petitioner requests issuance of a writ of certiorari.

Respectfully Submitted,

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APPENDIX A

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

In the Matter of:	)
	)
ARTHUR NOBLE, JR.	)
	)
A Minor Under the Age of Eighteen (18) Years. DOB: 5/31/83	)
	)

No. 3AN84-144A CP

MEMORANDUM OF DECISION AND ORDER DENYING TRANSFER OF JURISDICTION

The Alaska Department of Health and Social Services on April 17, 1984 petitioned for the adjudication of A.N., Jr. as a child in need of aid pursuant to AS 47.10.010(a)(2)(C). A.N., Jr. is an Indian within the definition of the Indian Child Welfare Act of 1978, 25 USC §1901 et seq. The Native Village of Nenana appeared May 15, 1984, was granted intervenor status, and seeks the transfer of jurisdiction over this case to itself.

The Native Village of Nenana has not been approved by the Secretary of the United States Department of the Interior to reassume jurisdiction over child custody proceedings pursuant to 25 USC §1918. The village, however, asserts that it nevertheless has jurisdiction. No authority can be found for this assertion especially in light of the specific provisions of 25 USC §1918 which establish the procedures and requirements for a tribal court to reassume jurisdiction over child custody proceedings. The State of Alaska has an obligation to protect A.N., Jr., the same as any other child "residing or found in the state." In order to relive the state from its obligation, the Native Village of Nenana would have to have met the requirements of 25 USC §1918 and §1911. See Johnson v Chilkat

Indian Village, 457 F.Supp. 384 (D. Alaska 1978).

As an aside, the Indian tribes in Alaska became subject to state jurisdiction pursuant to 28 USC §1360(a) and Art. XV, sec. 1, Constitution of Alaska. AS 47.10.010(a) governs proceedings relating to any child "residing or found in the state" and those proceedings are within the jurisdiction of the superior court. AS 47.10.290(1). This case did not arise in "Indian country," in any event, but within the Municipality of Anchorage.

Therefore,

IT IS ORDERED that the motion by the Native Village of Nenana to transfer jurisdiction to it is denied.

DATED at Anchorage, Alaska, this 24th day of July, 1984.

/s/ Victor D. Carlson
Superior Court Judge

APPENDIX B

THE SUPREME COURT OF THE STATE OF ALASKA

NATIVE VILLAGE OF NENANA, Appellant vs. STATE OF ALASKA, DEPARTMENT OF HEALTH & SOCIAL SERVICES Appellee.	File No. S-692 O P I N I O N [#3082-8/18/86]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Victor D. Carlson, Judge.

Appearances: Michael J. Walleri, Tanana Chiefs Conference, Inc., Fairbanks, for Appellant. Deborah Howard, Assistant Attorney General, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellee.

Before: Rabinowitz, Chief Justice; Burke, Matthews, Compton and Moore, Justices.

BURKE, Justice.

The question in this appeal is whether, under the Indian Child Welfare Act, P.L. 85-608, 92 Stat. 3069 (1978), the superior court erred in denying an Indian tribe's petition for an order

transferring the case of an Indian child from the jurisdiction of the court to that of the tribe. We conclude that the lower court properly denied the petition.

I

The Alaska Department of Health and Social Services petitioned the superior court to determine whether A.N. was a "child in need of aid" under AS 47.10.010-(a)(2)(C). The Department initiated such action after it learned that A.N. had been physically abused while in the custody of his mother and stepfather in Anchorage. At a probable cause hearing, the court awarded the Department temporary custody pursuant to AS 47.10.140.

A.N.'s natural father is an Athabascan Indian from the Alaska Native Village of Nenana. Thus, for purposes of the Indian Child Welfare Act, A.N. is an "Indian child", and the Alaska Native Village of Nenana is A.N.'s "Indian

tribe". See 25 USC §1904(4)-(5) (1983). Because of A.N.'s tribal relationship, the village was allowed to intervene in the child-in-need-of-aid proceeding. At the proceeding, it petitioned for an order transferring the case to the jurisdiction of the tribe under 25 USC §1911 (b) (1983) which allows tribal jurisdiction in certain child custody proceedings. The superior court denied the petition and, following entry of a final judgment, the village filed this appeal.

II

The tribe petitioned for transfer pursuant to 25 USC §1911(b). In reaching our decision, we assumed that the instant case met all of the criteria of section 1911(b), as argued by the Village of Nenana. Moreover, we are cognizant of the fact that the superior court made no finding of "good cause" as

a basis for refusing to transfer the case. Nevertheless, we believe the superior court properly denied the tribe's petition for transfer.

The jurisdictional section of the Indian Child Welfare Act provides, in pertinent part:

> (a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.
>
> (b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of the Indian child's tribe: Provided, That such transfer shall be subject to

declination by the tribal court of such tribe.

25 USC §1911 (1983) (emphasis in original). The superior court found that "[t]he Native Village of Nenana has not been approved by the Secretary of the United States Department of the Interior to reassume jurisdiction over child custody proceedings pursuant to 25 USC §1918." Thus, the court concluded that the tribe was not entitled to exercise jurisdiction and denied the tribe's petition. Section 1918(2), provides:

> Any Indian tribe which becomes subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

25 USC §1918(a) (1983) (emphasis added). The Act of August 15, 1953, mentioned in Section 1918(a) and codified as 28 USC §1360, is commonly referred to as "PL 280". Alaska has been a "280 state" since 1958. PL 65-615, 72 Stat. 545 (1958).

Our reading of 25 USC §1918(a), indicates that Congress intended that PL 280 give certain states, including Alaska, exclusive jurisdiction over matters involving the custody of Indian children, and that those states exercise such jurisdiction until a particular tribe petitions to reassume jurisdiction over such matters, and the Secretary of the Interior approves tribe's petition.

Although some commentators have concluded that PL 280 does not create exclusive state jurisdiction, see, e.t., F. Cohen, Handbook of Federal Indian law, 344-45 (1982 ed.); D. Case, Alaska

Natives and American Laws, 490 n.119 (1978), we see no explanation for the mention of PL 280 in section 1918(a) unless it required reassumption. See Note, The Indian Child Welfare Act - Tribal Self-Determination Through Participation in Child Custody Proceedings, 1979 Wis. L. Rev. 1202, 1212 [exclusive jurisdiction under §1911(a) is not automatic; tribes must petition for reassumption]. Regardless of whether PL 280 vests exclusive or concurrent jurisdiction in the applicable states, prior to the Child Welfare Act, Indian tribes may not have had jurisdiction over custody proceedings in a section 1911(b) situation, i.e., where the child was domiciled off the reservation. See Wisconsin Potowatomies v Houston, 393 F. Supp. 719 (W.D. Mich. 1973) (tribe "would have been obligated to submit itself to the jurisdiction of

the probate court", if domicile outside reservation); Jurisdiction of Tribal Court and Colorado Juvenile Court for Determination of Custody of Dependent and Neglected Indian Child, 62 Interior Dec. 466, 468 (1955) (opinion by Interior Department that tribal custody decree is ineffective because, in part, "the jurisdiction of Indian tribes ceases at the border of the reservation"); but cf. F. Cohen at 347-48 ([o]utside Indian country tribal courts can have jurisdiction based on tribal membership", though most tribes exercise it over only uniquely internal matters). The referral jurisdiction provision may actually grant Indian tribes greater authority than they had prior to the Act.

A task force appointed to study Federal-State-Tribal relations in Alaska recently observed:

> [S]everal commentators have argued that, assuming that IRA and traditional councils are otherwise empowered to exercise powers of self-government, PL 83-280 did not preempt the councils governmental powers, and, consequently, that Native councils may continue to exercise their jurisdiction concurrently with the state.
>
> It is difficult to reconcile that conclusion with the subsequent intent of Congress embodied in legislation enacted in 1970 to enable the Metlakatla Indian community to exercise concurrent criminal jurisdiction.

Report, Governor's Task Force on Federal-State-Tribal Relations [in Alaska], 141-42 (1986) (footnotes omitted). With regard to the particular question of jurisdiction under the Indian Child Welfare Act, the task force concluded: "Native councils may petition the Secretary of the Interior to assume complete or referral jurisdiction over Native child custody proceedings." Id. at 152 (emphasis added). This appears

to be a reference to 25 USC §1911(a) and (b), which supports our interpretation.

For purposes of the Indian Child Welfare Act, the term "Indian tribe" includes any Alaska Native village as defined in section 1602(c) of Title 43 of the United States Code. 25 USC §1903(8) (1983). According to section 1602(c):

> "Native village" means any tribe, band, clan, village, community, or association in Alaska listed in sections 1610 and 1615 of this title, or which meets the requirements of this chapter, and which the Secretary [of the Interior] determines was, in the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives.

43 USC §1602(c) (1983). There are more than 200 such villages "listed" in sections 1610 and 1615 alone. 43 USC §§1610, 1615 (1983). Some of these entities already may have systems for

APPENDIX C

25 USCA 1911

(a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceedings to the

jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such

entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

25 USCA 1918

(a) Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73,78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b)(1) In considering the petition and feasibility of the plan of a tribe

under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of the jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multi-tribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 101(a) of this Act are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 101(b) of this Act, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 101(a) over limited community or geographic areas without regard for the reservation status of the area affected.

(c) If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval.

If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 109 of this Act.

28 USCA §1360

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed

opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian Country affected
Alaska	All Indian country within the Territory.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the

exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

APPENDIX D

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

In the Matter of:	)
	)
ARTHUR NOBLE, JR.	)
DOB: 5/31/83	)
	)
A Minor Under the	)
Age of Eighteen	)
(18) Years.	)
	)

No. 3AN84-144A CP

PETITION FOR TRANSFER OF JURISDICTION

The Native Village of Nenana, by and through its attorney-of-record, Michael J. Walleri, hereby states and verifies as follows:

1) The above-named child is a tribal member of the Native Village of Nenana, having descended from one Arthur Noble II, a tribal member.

2) To the best of the Village's knowledge, the child is not a member or eligible to be a member of any other Indian tribe.

3) The mother of said child does not object to said transfer.

4) The father of said child does not object to said transfer.

5) The child resides "off-reservation".

6) Good cause to decline transfer of jurisdiction to the Village of Nenana does not exist.

WHEREFORE, petitioner hereby prays for transfer of the above-captioned proceedings to the jurisdiction of the Native Village of Nenana, release of said child to the custody of representatives of the Village of Nenana, and dismissal of the above-captioned cause before this Court.

Dated this 10th day of May, 1984.

By /s/ MICHAEL J. WALLERI
Attorney-of-Record

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

In the Matter of:	)
	)
A.N., JR.	)
DOB: 5/31/83	)
	)
A Minor Under the	)
Age of Eighteen	)
(18) Years.	)
	)

No. 3AN84-144A CP

STATEMENT OF POINTS ON APPEAL

COMES NOW, the Native Village of Nenana, Intervenor in above-captioned matter, by and through counsel, and files the following points on appeal.

1. The Court erred by not granting the Village's petition to transfer jurisdiction to the child's tribe pursuant to 25 USCA 1911(b).

Dated this 25th day of October, 1984.

/s/ MICHAEL J. WALLERI
Attorney for Intervenor

(2)

No. 86-662

In The

Supreme Court of the United States

October Term, 1986

NATIVE VILLAGE OF NENANA,

Petitioner,

v.

STATE OF ALASKA, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

RESPONDENT'S BRIEF IN OPPOSITION

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28 pp

QUESTION PRESENTED

Should this Court grant certiorari to determine whether the Alaska Supreme Court was correct that an Alaska Native village must be authorized to reassume jurisdiction by the Secretary of the Interior under 25 U.S.C. § 1918 before a child protective proceeding may be transferred from state court to the tribal court?

LIST OF PARTIES

The parties to this proceeding are the Native Village of Nenana, petitioner, and the State of Alaska, Department of Health and Social Services, respondent.

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STATEMENT OF THE CASE

The following facts are presented in addition to the history provided in the petitioner's statement of the case. The mother of the minor is a non-Native. At the time the Native council originally sought a transfer to itself, the mother of the minor did not object. However, after the decision denying transfer in the Alaska Superior Court, and before the issue was appealed to the Alaska Supreme Court, the mother of the minor objected to transfer of the case to the council. The mother stipulated that her son was a child in need of aid and he was placed in the legal and physical custody of the state.

Furthermore, this Court should be aware that Nenana is one of over 200 off-reservation Native villages in Alaska. The Alaska Supreme Court found that although some of them may be capable of adjudicating children's cases, others are not.

———o———

REASONS WHY THE PETITION SHOULD BE DENIED

The Native Village of Nenana (Nenana) has based its petition for a writ of certiorari on three grounds. First, Nenana claims that the Alaska Supreme Court's decision in *Native Village of Nenana v. State of Alaska, Department of Health and Social Services,* 722 P.2d 219 (Alaska 1986), decided an important question of federal law which should be settled by this Court. Second, Nenana claims that the *Nenana* decision conflicts with applicable decisions of this Court. Finally, Nenana argues that the decision conflicts with an earlier decision of the Alaska Supreme Court and with a decision of the Ninth Circuit Court of Appeals.

The State will show that the *Nenana* decision is not in conflict with existing case law and is applicible only to Alaska. Thus, the State urges that this Court deny the petition.

I. The Alaska Supreme Court's interpretation of 25 U.S.C. § 1918 is applicable only to Alaska.

The *Nenana* opinion rests on the Alaska Supreme Court's interpretation of two federal statutes, 28 U.S.C. § 1360 (commonly known as Pub.L. 280) and 25 U.S.C. §§ 1901-1963, the Indian Child Welfare Act (ICWA). The jurisdictional issues created by the relationship between Pub.L. 280 and the ICWA have not been addressed by the federal courts. However, the conflicts in case law and impact to other states asserted by Nenana do not exist. Alaska is unique among other Pub.L. 280 states because of its large number of off-reservation villages. This was recognized by Congress when it enacted 25 U.S.C. § 1918.[1] Thus, the *Nenana* decision has ultimate significance only for the State of Alaska.

Nenana claims that the question presented below merits this Court's attention because the Alaska Supreme Court's decision affects all Pub.L. 280 states and all tribes in those states. This argument ignores the differences between the broad jurisdiction granted to the six mandatory Pub.L. 280 states and the different degrees of jurisdiction accepted by the optional Pub.L. 280 states. For example, more than half of the optional states have no jurisdiction over child custody proceedings on reservations, while the mandatory states have jurisdiction over all such

---

[1]See H. Rep. No. 95-1386, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 7547.

cases. *See* F. Cohen, *Handbook of Federal Indian Law*, p. 362 n. 125 (1982 ed.).

Nenana's claims regarding the breadth of the impact of the Alaska Court's decision also ignores the differences between Alaska and the other mandatory Pub.L. 280 states. Public Law 280 was extended to Alaska in 1958 because Congress recognized the need to extend state court civil and criminal jurisdiction to Native villages. Congress recognized that

> [Alaska's] native villages do not have adequate machinery for enforcing law and order. They have *no tribal court,* no police, no criminal code, and *in many instances no formal organization.*

S. Rep. No. 1872, 85th Cong., 2d Sess., *reprinted* in 1958 U.S. Code Cong. & Ad. News 3347-48 (emphasis added). Because this is not the case in other states, the *Nenana* decision will not have an impact on other Pub.L. 280 states.

A. The petition presents complex legal and factual questions which have not been addressed in the lower courts.

The 1971 enactment of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §1601, provides further evidence of Congress's intent to treat Alaska differently. In adopting ANCSA, Congress declared its intent to create a fair and just settlement of all claims by Natives and Native groups in Alaska based on aboriginal land claims "without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship. . . ." 42 U.S.C. § 1601(a)&(b). Congress then expressly extinguished all aboriginal title and claims to aboriginal title that might have existed in Alaska. 43 U.S.C. § 1603. All reservations in Alaska, except the

Metlakatla Indian Community of the Annette Island Reserve were revoked. 43 U.S.C. §1618. Thus, Congress extinguished substantially all "Indian country" within Alaska to which Pub.L. 280 would apply.

These factors make the effect of Pub.L. 280 unique in Alaska, although the Alaska Supreme Court did not address them directly. The situation in Alaska is factually complex. Over 200 off-reservation village councils exist in Alaska. This arguably presents 200 jurisdictional questions for Alaska. To the extent such factors affect the breadth of *Nenana's* applicability, they have not been fully litigated in the Alaska courts and are not ripe for review by this Court.

Furthermore, any Alaska Native village may reassume jurisdiction through a petition to the Secretary of the Interior. To our knowledge, none has ever been denied. The State of Alaska has agreed to support any reassumption petition which meets the Secretary's criteria. Thus, this controversy may become moot over time.

II. The Nenana decision need not be reviewed because it is consistent with the distinction this Court has made between subject areas Pub L. 280 states may exercise jurisdiction over and those it may not.

A. The Nenana decision is consistent with the principles enunciated in Bryan v. Itasca County.

The Alaska Supreme Court concluded in the *Nenana* decision that child custody proceedings cannot be transferred to Alaska Native villages under 25 U.S.C. § 1911(b)

absent authorization by the Secretary of the Interior for reassumption of jurisdiction pursuant to 25 U.S.C. § 1918. *See* 772 P.2d at 221. Since Nenana had not sought reassumption of jurisdiction from the Secretary, the Alaska court affirmed the trial court's denial of the village's petition for transfer.

The Native Village of Nenana's argument that the *Nenana* decision conflicts with decisions of this Court reflects confusion over the distinction between exclusive jurisdiction over a particular subject matter and comprehensive jurisdiction over all subject matters. This Court has never addressed the issue of whether Pub.L. 280 grants "exclusive" jurisdiction to the states over the subject matters addressed in 28 U.S.C. § 1360 (civil) and 18 U.S.C. § 1162 (criminal). This Court has held that the grant of civil jurisdiction to mandatory states under 28 U.S.C. § 1360 is not comprehensive. *See Bryan v. Itasca County*, 426 U.S. 373, 379, 384, 390 (1976) (the extension of state civil jurisdiction to tribal lands does not include the power to tax). In *Bryan*, the plain language of 28 U.S.C. § 1360(a) led this Court to conclude that "the primary intent of [28 U.S.C. § 1360] was to grant jurisdiction over private civil litigation involving reservation Indians *in state court.*" 426 U.S. at 385 (emphasis added). The reassumption issue was not addressed by this Court in *Bryan*.

The scope of the subject matter jurisdiction which may be assumed by an optional Pub.L. 280 state was addressed by this Court in *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979). This Court affirmed therein that an optional

Pub.L. 280 state has the power to assume partial subject matter jurisdiction over matters relating to "dependent children" and "adoption proceedings", as well as other areas. 439 U.S. at 475-76. If these child custody proceedings are appropriate subject matters for optional Pub.L. 280 states, they must also be subsumed in the full Pub.L. 280 jurisdiction given to mandatory states.

This Court's decisions in *Bryan* and *Yakima Indian Nation* support the Alaska Supreme Court's conclusion that Pub.L. 280 gave state courts jurisdiction over child custody proceedings involving Native children. However, these decisions do not resolve the dispute over whether that grant of jurisdiction is exclusive or concurrent with asserted tribal jurisdiction. The Alaska court's analysis of that issue is consistent with the approach this Court has taken to resolve conflicts between tribes and states. This Court has repeatedly acknowledged that

> . . . our recent cases have established a "trend . . . away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption."

Rice v. Rehner, 463 U.S. 713, 718 (1983) quoting *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 (1973) (footnote omitted). The federal pre-emption analysis as used by this Court

> . . . is *informed* by historical notions of tribal sovereignty, *rather than determined by them*. . . . Although "[t]he right of tribal self-government is ultimately dependent on and subject to the broad power of Congress," we still employ the tradition of Indian sovereignty as a "backdrop against which the applicable treaties and federal statutes must be read" in our pre-emption analysis.

> . . . The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.

463 U.S. at 718-19 (emphasis added) (citations omitted). Thus, the approach used in the *Nenana* decision is consistent with this Court's federal pre-emption analysis because it recognizes Congress's role of limiting tribal jurisdiction in Alaska.

The Alaska court found in the *Nenana* decision that of the 200 Native villages in Alaska, some may be capable of adjudicating child custody matters in a competent fashion, but others may not be so equipped. 722 P.2d at 222. The court further found that it is "highly unlikely" that Congress was unaware of this when the ICWA was enacted. *Id.* Thus, the Alaska court considered and implicitly recognized that the "backdrop" of tribal sovereignty in Alaska has been limited by Congress.

Against this congressional limitation of tribal sovereignty in Alaska, the Alaska court's analysis of 28 U.S.C. § 1360 and the relevant provisions in ICWA, 25 U.S.C. §§ 1911(a) and 1918(a) cannot be faulted. Congress gave Alaska exclusive civil and criminal jurisdiction because the Native villages in Alaska were not exercising that jurisdiction. *See* S. Rep. No. 1872, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Ad. News 3347-48. The interplay between 25 U.S.C. §§ 1911(a) and 1918(a) further confirms Congress's intent to give Alaska exclusive jurisdiction over child custody proceedings. By enacting 25 U.S.C. § 1918(a), Congress created a process for tribes to assume jurisdiction over child custody proceedings. Having failed to follow the process established

in 25 U.S.C. § 1918, Nenana cannot now complain of the Alaska court's enforcement of it.

B. The Nenana decision is not in conflict with this Court's decision in U.S. v. Wheeler.

Nenana also claims that the *Nenana* decision conflicts with this Court's analysis in *United States v. Wheeler*, 435 U.S. 313 (1978). The issue in *Wheeler* was whether a federal prosecution is barred by the double jeopardy clause of the U.S. Constitution because of an earlier tribal prosecution. The matter arose in a non-Pub.L. 280 state. Further, the dual sovereignty analysis in *Wheeler* has not been applied in subsequent cases addressing the relationship between tribal and state jurisdiction. *Compare Wheeler*, 435 U.S. at 317-18 with *Yakima Indian Nation*, 439 U.S. 481. Thus, *Wheeler* does not advance the discussion regarding the exclusivity of state jurisdiction.[2]

III. The Alaska Supreme Court's decision in Nenana is consistent with existing Alaska and Ninth Circuit case law.

A. The Nenana decision is consistent with the Alaska Supreme Court's decision in J.M.

Nenana claims that the *Nenana* decision conflicts with the Alaska Supreme Court's earlier decision, *In the Matter of J.M.*, 718 P.2d 150 (Alaska 1986). A reading of *J.M.* reveals that the question of reassumption of jurisdiction by the village council was not briefed, argued, or considered in the trial court or the Alaska Supreme Court. The issue before the court in *J.M.* was a narrow one: "[D]id

---

[2]It is worth noting that the Ninth Circuit Court of Appeals recognized the exclusive jurisdiction of a Pub.L 280 state in *United States v. Hoodie*, 588 F.2d 292 (9th Cir. 1978).

the trial court err in finding that the tribe had waived its exclusive jurisdiction?" 718 P.2d at 153. The court held that a tribe's waiver of exclusive jurisdiction must be express, unequivocal, knowingly made, and, therefore, should be in writing. 718 P.2d at 156.

J.M. was argued solely on the village's claim of exclusive jurisdiction over a child the village had made a ward of its tribal court. *See* 25 U.S.C. § 1911(a), 718 P.2d at 151-52. The Alaska court explicitly recognized that it was not asked to decide whether the village of Kaltag is an "Indian tribe" or whether the village council is a "tribal court" under the ICWA. 718 P.2d at 153. Although the *Nenana* opinion was decided in a Section 1911 (b) transfer case, *Nenana* affects *J.M.* by identifying the reassumption question as the first question to be answered in a situation where an Alaska native village claims jurisdiction in a child custody case.[3]

B. The Nenana decision is consistent with Ninth Circuit case law.

Nenana also asserts a conflict exists between the *Nenana* decision and *Native Village of Stevens v. Smith*, 770 F.2d 1486 (9th Cir. 1985), *cert. denied* 106 S.Ct. 1640 (1986). Again, no conflict exists because the reassumption issue was not raised in *Stevens*. The issue in *Stevens* was whether the State of Alaska is required to make foster

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[3]Significantly, the ICWA does not require a tribe to have a tribal court with jurisdiction over child custody proceedings in order to participate fully in a state court proceeding by intervention. 25 U.S.C. § 1911(c). The reassumption requirement does not, therefore, prevent the child's tribe from playing the important role in state proceedings created for it by Congress. *Compare* 25 U.S.C. §§ 1901 and 1902 *with* § 1912.

care payments for a child made a ward of the tribal court. In order to reach its decision, the court was required to interpret the Social Security Act, 42 U.S.C. § 672(c) in relation to the ICWA, 25 U.S.C. § 1931(b). The state chose not to contest the issue of Stevens' jurisdiction because the case could easily be disposed of on other grounds. *See* 770 F.2d at 1488 n. 2. The Ninth Circuit Court of Appeals held that the threshold requirement that there be an agreement between the state and the placing authority had not been met. The Ninth Circuit found that no agreement existed and held that the tribe cannot force the state to enter into an agreement under the ICWA. The court never reached the question of tribal jurisdiction. As in *J.M.*, the *Nenana* decision does not impede the application of *Stevens;* it simply identifies the threshold question of whether an Alaska Native village has reassumed jurisdiction. Thus, the Alaska court's analysis in *Nenana* is consistent with the *Stevens* decision.

CONCLUSION

The petitioner's claims that the Alaska Supreme Court's decision in *Native Village of Nenana v. State of Alaska* is inconsistent with state and federal case law are without merit. The *Nenana* decision is consistent with the principles enunciated in prior decisions of this Court and those of other courts. Further, the decision resolves a dispute unique to Alaska, and will not have a significant impact on other states. Finally, given the complexity of

tribal/State jurisdiction because of the large number of village councils in Alaska and the lack of fully developed litigation in the lower courts, the State urges this Court to find that the *Nenana* decision is not ripe for review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Native Village of Nenana, Appellant,

v.

State of Alaska, Department of Health and Social Services, Appellee.

722 P.2d 219

Supreme Court of Alaska

July 18, 1986.

Michael J. Walleri, Tanana Chiefs Conference, Inc., Fairbanks, for appellant.

Deborah Howard, Asst. Atty. Gen., Anchorage, Norman C. Gorsuch, Att. Gen., Juneau, for appellee.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

BURKE, Justice.

The question in this appeal is whether under the Indian Child Welfare Act, Pub.L. 95-608, 92 Stat. 3069 (1978), the superior court erred in denying an Indian tribe's petition for an order transferring the case of an Indian child from the jurisdiction of the court to that of the tribe. We conclude that the lower court properly denied the petition.

I

The Alaska Department of Health and Social Services petitioned the superior court to determine whether A.N. was a "child in need of aid" under AS 47.10.010(a)(2)(C). The Department initiated such action after it learned

that A.N. had been physically abused while in the custody of his mother and stepfather in Anchorage. At a probable cause hearing, the court awarded the Department temporary custody pursuant to AS 47.10.140.

A.N.'s natural father is an Athabascan Indian from the Alaska Native Village of Nenana. Thus, for purposes of the Indian Child Welfare Act, A.N. is an "Indian child," and the Alaska Native village of Nenana is A.N.'s "Indian tribe." See U.S.C. § 1903(4)-(5) (1983). Because of A.N.'s tribal relationship, the village was allowed to intervene in the child in need of aid proceeding. At the proceeding, it petitioned for an order transferring the case to the jurisdiction of the tribe under 25 U.S.C. § 1911 (b) (1983) which allows tribal jurisdiction in certain child custody proceedings. The superior court denied the petition and, following entry of a final judgment, the village filed this appeal.

II

The tribe petitioned for transfer pursuant to 25 U.S.C. § 1911(b). In reaching our decision, we have assumed that the instant case met all of the criteria of section 1911 (b), as argued by the Village of Nenana. Moreover, we are cognizant of the fact that the superior court made no finding of "good cause" as a basis for refusing to transfer the case. Nevertheless, we believe the superior court properly denied the tribe's petition for transfer.

The jurisdictional section of the Indian Child Welfare Act provides, in pertinent part:

> (a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding

> involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.
>
> (b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

25 U.S.C. § 1911 (1983) (emphasis in original). The superior court found that "[t]he Native Village of Nenana has not been approved by the Secretary of the United States Department of the Interior to reassume jurisdiction over child custody proceedings pursuant to 25 U.S.C. § 1918." Thus, the court concluded that the tribe was not entitled to exercise jurisdiction and denied the tribe's petition. Section 1918(a), provides:

> Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. *Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.*

25 U.S.C. § 1918(a) (1983) (emphasis added). The Act of August 15, 1953, mentioned in section 1918(a) and codified as 28 U.S.C. § 1360, is commonly referred to as "Public Law 280." Alaska has been a "280 state" since 1958. Pub.L. 85-615, 72 Stat. 545 (1958).

Our reading of 25 U.S.C. § 1918(a), indicates that Congress intended that Public Law 280 give certain states, including Alaska, exclusive jurisdiction over matters involving the custody of Indian children, and that those states exercise such jurisdiction until a particular tribe petitions to reassume jurisdiction over such matters, and the Secretary of the Interior approves tribe's petition.

Although some commentators have concluded that Public Law 280 does not create exclusive state jurisdiction, *see, e.g.,* F. Cohen, *Handbook of Federal Indian Law,* 344-45 (1982 ed.); D. Case, *Alaska Natives and American Laws,* 490 n. 119 (1978), we see no explanation for the mention of Public Law 280 in section 1918(a) unless it required reassumption. *See* Note, *The Indian Child Welfare Act—Tribal Self-Determination Through Participation in Child Custody Proceedings,* 1979 Wis.L. Rev. 1202, 1212 (exclusive jurisdiction under § 1911(a) is not automatic; tribes must petition for reassumption). Regardless of whether Public Law 280 vests exclusive or concurrent jurisdiction in the applicable states, *prior* to the Child Welfare Act, Indian tribes may not have had jurisdiction over custody proceedings in a section 1911(b) situation, *i.e.,* where the child was domiciled off the reservation. *See Wisconsin Potowatomies v. Houston,* 393 F.Supp. 719 (W.D. Mich. 1973) (tribe "would have been obligated to submit itself to the jurisdiction of the probate court,"

if domicile outside reservation); *Jurisdiction of Tribal Court and Colorado Juvenile Court for Determination of Custody of Dependent and Neglected Indian Child*, 62 Interior Dec. 466, 468 (1955) (opinion by Interior Department that tribal custody decree is ineffective because, in part, "the jurisdiction of Indian tribes ceases at the border of the reservation"); *but cf.* F. Cohen at 347-48 ("[o]utside Indian country tribal courts can have jurisdiction based on tribal membership," though most tribes exercise it over only uniquely internal matters). The referral jurisdiction provision may actually grant Indian tribes greater authority than they had prior to the Act.

A task force appointed to study Federal-State-Tribal relations in Alaska recently observed:

> [S]everal commentators have argued that, assuming that IRA and traditional councils are otherwise empowered to exercise powers of self-government, Pub.L. 83-280 did not prempt the council's governmental powers, and, consequently, that Native councils may continue to exercise their jurisdiction concurrently with the state.
>
> It is difficult to reconcile that conclusion with the subsequent intent of Congress embodied in legislation enacted in 1970 to enable the Metlakatla Indian Community to exercise concurrent criminal jurisdiction.

Report, *Governor's Task Force on Federal-State-Tribal Relations* [*In Alaska*], 141-42 (1986) (footnotes omitted). With regard to the particular question of jurisdiction under the Indian Child Welfare Act, the task force concluded: "*Native councils may petition the Secretary of the Interior to assume complete or referral jurisdiction over Native child custody proceedings.*" *Id.* at 152 (empha-

sis added). This appears to be a reference to 25 U.S.C. § 1911(a) and (b), which supports our interpretation.

For purposes of the Indian Child Welfare Act, the term "Indian tribe" includes any Alaska Native Village as defined in section 1602(c) of Title 43 of the United States Code. 25 U.S.C. § 1903(8) (1983). According to section 1602(c):

> "Native village" means any tribe, band, clan, village, community, or association in Alaska listed in sections 1610 and 1615 of this title, or which meets the requirements of this chapter, and which the Secretary [of the Interior] determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives.

43 U.S.C. § 1602(c) (1983). There are more than 200 such villages "listed" in sections 1610 and 1615 alone. 43 U.S.C. §§ 1610, 1615 (1983). Some of these entities already may have systems for dispute resolution in place capable of adjudicating custody matters in a reasonable and competent fashion; others, no doubt, do not. It seems highly unlikely that Congress was unaware of this when it enacted the Indian Child Welfare Act, or that it intended the Indian tribes in Alaska to exercise jurisdiction in child custody matters until such time as there is satisfactory proof that a particular tribe has the ability to properly adjudicate such cases.[1]

The judgment is AFFIRMED.

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[1]Given the relationship that has always existed between the federal government and the various "Indian tribes," this determination appears to be one that would have to be made by a federal official, in this case, the Secretary of the Interior.

APPENDIX B

25 U.S.C. § 1360. State civil jurisdiction in actions to which Indians are parties.

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	*Indian country affected*
Alaska	All Indian country within the State
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(As amended July 10, 1984, Pub.L. 98-353, Title I, § 110, 98 Stat. 342.)

25 U.S.C. § 1911. Indian tribe jurisdiction over Indian child custody proceedings.

(a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law.

Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

(Pub.L. 95-608, Title I, § 101, Nov. 8, 1978, 92 Stat. 3071.)

25 U.S.C. § 1918. Reassumption of jurisdiction over child custody proceedings.

(a) Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to

any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) (1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this

title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected States or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

(Pub.L. 95-608, Title I, § 101, Nov. 8, 1978, 92 Stat. 3074.)